

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: Medtronic, Inc.,)
Implantable Defibrillators) File No. MDL #05-1726
Products Liability Litigation)
)
) Minneapolis, Minnesota
) December 21, 2006
) 9:00 a.m.
)
)
)

BEFORE THE HONORABLE JUDGE ARTHUR J. BOYLAN
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE
(STATUS CONFERENCE AND MOTION HEARING)

APPEARANCES

For the Plaintiffs: GUSTAFSON GLUEK, PLLC
DANIEL E. GUSTAFSON, ESQ.
608 2nd Ave. S, #650
Minneapolis, MN 55402

ZIMMERMAN REED, PLLP
CHARLES S. ZIMMERMAN, ESQ.
651 Nicollet Mall, #501
Minneapolis, MN 55402-4123

For the Defendant: GREENBERG TRAUERIG, LLP
LORI G. COHEN, ESQ.
JAY B. BRYAN, ESQ.
3290 Northside Pkwy, #400
Atlanta, GA 30327

HALLELAND, LEWIS, NILAN &
JOHNSON
DONALD M. LEWIS, ESQ.
600 U.S. Bank Plaza S.
220 S. 6th St.
Minneapolis, MN 55402

1 Court Reporter: DEBRA BEAUVAIS, RPR-CRR
2 180 East Fifth Street
3 St. Paul, Minnesota 55101
4

5 Proceedings recorded by mechanical stenography;
6 transcript produced by computer.
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

IN OPEN COURT

THE COURT: This is the matter of Medtronic, Inc., MDL #05-1726. This is a monthly status conference that is on the Court's calendar. Let's have the attorneys who are at the podium identify themselves, please.

MS. COHEN: Lori Cohen on behalf of Defendant Medtronic, Inc.

MR. GUSTAFSON: Dan Gustafson for the MDL Plaintiffs.

THE COURT: Good morning to each of you.

I have an agenda that was prepared by the parties, and the first matter on the agenda is the testing protocol for devices in plaintiffs' possession.

Mr. Gustafson or Ms. Cohen.

MR. GUSTAFSON: Your Honor, we have reached an agreement on an order that would require turnover of the devices and has certain timetables; in addition, provides some chain of custody information, and we will be submitting that to Your Honor for your signature.

THE COURT: Very good. I have the second matter is the Rule 16 case management schedules. I have the proposals by both sides. I also understand the parties will be meeting and conferring in reference to this to see whether those differences can be resolved and, if so, you

1 will be presenting to me a joint proposal on or before
2 January 5 of 2007. Is that correct?

3 MS. COHEN: That's correct, Your Honor. We will
4 meet and confer and then present that to you, and then if
5 there are any areas of dispute, we will highlight them for
6 you to discuss on the 5th.

7 MR. GUSTAFSON: That's correct.

8 THE COURT: All right. I have as item number
9 three plaintiffs' and defendant's fact sheets.

10 MR. GUSTAFSON: Your Honor, based on our
11 conversations, I believe we are going to be able to resolve
12 that. We will take what you have said and what Judge
13 Rosenbaum said about making sure it's relevant. We will put
14 together something we can work out.

15 MS. COHEN: That's correct, Your Honor. We will
16 look at the ones we propose and try to find a middle ground.

17 THE COURT: I have as number four plaintiffs'
18 motions to amend master consolidated complaint for
19 individuals. I believe that this has been agreed to between
20 the parties as one that we are likely to go forward with by
21 motion to grant this in, and you will be agreeing between
22 yourselves as to a timetable for presenting motions, the
23 answers and so forth.

24 MR. GUSTAFSON: We will call your office or your
25 chambers and get a date. I take it that's going to be in

1 front of you?

2 THE COURT: I would presume so. Why don't you
3 schedule it before me as a non-dispositive motion until you
4 hear to the contrary. I can alert Judge Rosenbaum's
5 chambers that it's been placed on my calendar, and if he
6 wishes to have it heard here, we'll just simply alert the
7 parties they should contact his chambers. For the time
8 being it seems to me that should be on my calendar, both the
9 motion to add punitive damages as well as any issues in
10 reference to Minnesota Statute 325F.71. And I understand
11 that that likely is not even going to be in need of a motion
12 practice.

13 MS. COHEN: The latter one may not, Your Honor,
14 you are right. The more relevant one is the punitive
15 damages one. We will work with Mr. Gustafson on a schedule
16 once he has a date from your office.

17 MR. GUSTAFSON: Just to make sure we are clear, I
18 think that the motion to add punitive damages is going to be
19 filed in all of the master complaint cases. It says just
20 the individual ones, but I think it's going to be in the
21 third-party payor; although, we haven't made a final
22 decision on that. It's going to be the same issue. We will
23 get that scheduled up and briefed up for you.

24 MS. COHEN: Likewise, we would oppose it in all
25 three of them if that's the plaintiffs' intention.

1 THE COURT: Next I have handling of pro se
2 plaintiffs' requests and depositions.

3 MS. COHEN: Well, we think we will be able to work
4 out at least the first part of this, Your Honor, related to
5 the documents. And as we told you in chambers, there are
6 right now two pro se plaintiffs, and Mr. Gustafson on behalf
7 of the PSC will make sure that they have the protective
8 order, will make sure that they understand the parameters of
9 it, will make sure that they understand that the documents
10 that are given to them must maintain their confidentiality.
11 So that will be the burdens obligation of the PSC, and in
12 that sense we will agree that the documents can be shared
13 with the pro se plaintiffs.

14 As far as the depositions of pro se plaintiffs, we
15 agreed that that should be taken up later when we agree on a
16 deposition guideline protocol, and at that time we can
17 address the pro se plaintiffs issue, as well as everything
18 else, before we get to the stage of depositions.

19 MR. GUSTAFSON: Your Honor, that's correct, we
20 have agreed. I don't want to leave this record though sort
21 of unclear as to we are going to tell these people what
22 their obligations are, but we are not accepting
23 responsibility for what they do. I mean --

24 THE COURT: But the agreement between the parties
25 at least will outline the fact that they will be presented

1 with the confidentiality order. They will have explained to
2 them the obligations that they have not to violate the
3 order, and if signatures are needed that will be obtained as
4 part of the process.

5 MR. GUSTAFSON: We are going to agree on the
6 letter that we send to them and make sure they understand
7 clearly that they cannot disclose this information.

8 THE COURT: Is it the intent of the parties that
9 would be an agreed-upon order that you will ask the court to
10 sign or just --

11 MR. GUSTAFSON: I don't think we need an order.
12 We wanted to advise you. There is a potential at some point
13 down the road this is going to come back and be an issue
14 with respect to someone disclosing this stuff.

15 MS. COHEN: Actually, I think -- now that Your
16 Honor mentions it, I think it would be good to have it in
17 the form of an order given the fact that we are dealing with
18 pro se plaintiffs.

19 THE COURT: I think that might be appropriate.

20 MR. GUSTAFSON: It might have more influence.

21 THE COURT: Next I have rulings on device and
22 preservation issues raised in the October status conference.

23 MS. COHEN: I think on this we are close to
24 reaching an agreement. We told you in chambers that we
25 could continue to discuss this and if there are some areas

1 of dispute, then we will highlight just those areas for Your
2 Honor.

3 I think we have a protocol that we are going back
4 and forth with in terms of red lining it, and there are a
5 few issues in terms of the limitations on how many people
6 can be present and who can be present and so forth.

7 THE COURT: Mr. Gustafson.

8 MR. GUSTAFSON: I agree with that. I think we can
9 work it out. What we are also trying to do is find someone
10 here in Minneapolis who sort of could become the person so
11 that the convenience to Medtronic would be not having to try
12 to work around a schedule in which they have to fly somebody
13 in. One of our people have to fly in. We are trying to
14 work through that. I think we will and we will report back
15 on January 5th whether we made progress. That will be just
16 a stipulated amendment to the preservation order if we can
17 work it out.

18 THE COURT: Medtronic's motion to strike or sever
19 certain cases.

20 MS. COHEN: Yes, Your Honor. This is the motion
21 that has been pending since last January or February and is
22 set for a hearing before you on January 5th. And we talked
23 in chambers about different options available to the parties
24 to deal with this group of cases which we believe to be in
25 the range of 35 to 40 cases right now. And I think both

1 sides have told Judge Rosenbaum that we would report back
2 with more details about the plaintiffs, about what their age
3 is, and how long they have had the devices, and whether they
4 are explanted, and then based on that information we could
5 reconvene and come up with a plan, whether it be to take the
6 cases out of the MDL and have them remanded back or to come
7 up with some other approach to deal with them within the
8 context of this MDL.

9 MR. GUSTAFSON: That's right, Your Honor. Ms.
10 Cohen's colleague and I have had a short discussion and we
11 are going to gather the information, and so we should have a
12 much better idea of sort of how many and the status of those
13 cases by the time we see you on the 5th. Hopefully we may
14 even have a proposal for you.

15 MS. COHEN: Right.

16 THE COURT: Then I have a joint filing order for
17 plaintiffs, which I understand may be the subject of a
18 stipulation between the parties?

19 MR. GUSTAFSON: We generally agree on this topic.
20 It's just a question now of working out the language. I had
21 proposed an order to Ms. Cohen. She had made some
22 suggestions. We sort of ran out of time on working it
23 through. I believe, again, this is an issue we are going to
24 be able to work out.

25 MS. COHEN: That's correct, Your Honor.

1 THE COURT: All right. Anything else that the
2 plaintiffs or defendant want to bring to my attention that's
3 not on the agenda?

4 I do have a date for our next status conference of
5 January, I believe it was, 25th we talked about.

6 MS. COHEN: That's right, Your Honor, Thursday the
7 25th.

8 THE COURT: That would be at 8:00 a.m. in
9 chambers, and then 9:00 a.m. in court in reference to the
10 status conference. That would be scheduled here in
11 Minneapolis.

12 MR. GUSTAFSON: The only other thing, Your
13 Honor -- and I haven't looked at the rules to see if this is
14 covered, but my memory is it's not -- that Medtronic filed a
15 1292(b) certification motion yesterday. I don't believe
16 it's covered by the rules whether it's dispositive or
17 non-dispositive and what sort of briefing schedule. Would
18 you like us to just work out a schedule with Judge
19 Rosenbaum's chambers on that?

20 THE COURT: I believe that that should be promptly
21 assigned to -- likely be something that you would place
22 before Judge Rosenbaum. So I would first direct you to his
23 chambers, and to the extent he wants that certification
24 motion to be decided by me, he will let you know.

25 MS. COHEN: Just to clarify, it was filed late

1 yesterday. It was not filed as a motion.

2 THE COURT: So that's Judge Rosenbaum.

3 MS. COHEN: It takes it out of the realm of the
4 motion.

5 THE COURT: Sounds good.

6 Anything else from either Ms. Cohen or Mr.
7 Gustafson or any of the other lawyers who are in the
8 courtroom?

9 MR. GUSTAFSON: Nothing from the plaintiffs, Your
10 Honor.

11 MS. COHEN: Nothing, Your Honor.

12 THE COURT: Everyone have a safe and happy
13 holiday, and it's good to see everyone. We will be on
14 recess.

15 It's my understanding that Judge Rosenbaum has a
16 matter he is taking up in the same case and that was
17 scheduled for 9:00 so I would presume if everyone stays you
18 will be seeing Judge Rosenbaum shortly. Thank you.

19 (Court adjourned at 9:05 a.m.)

20 * * *

21

22

23 I, Debra Beauvais, certify that the foregoing is a
24 correct transcript from the record of proceedings in the
25 above-entitled matter.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Certified by: _____
Debra Beauvais, RPR-CRR

DEBRA BEAUVAIS, RPR-CRR
(651) 848-1223